

SOUTH AFRICA / JUDGMENT

Move on Up 104 CC and Others v Sagewise 1018 CC t/a Dragon Fuels and Others (14300/15) [2016] ZAKZPHC 3 (5 January 2016) [2016] ZAKZPHC 3

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes

CASE / FILE NUMBER

14300/15

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL – DIVISION, PIETERMARITZBURG

Case No :14300/15

DATE: 05 JANUARY 2016

In the matter between :

Move on Up 104 CC.....First Applicant

Kwikcorp 1 CC t/a Leon Motors.....Second Applicant

NCL Moola's (Pty) Ltd t/a Newcastle Pitstop.....Third Applicant

We-Two Investments CC t/a Auto City.....Fourth Applicant

LMD Africa Forensics (Pty) Ltd.....Fifth Applicant

And

Sagewise 1018 CC t/a Dragon Fuels.....First Respondent

Kadbro Taxi City CC.....Second Respondent

Seyma Investments (Pty) Ltd.....Third Respondent

Newcastle Local Municipality.....Fourth Respondent

Controller of Petroleum Products.....Fifth Respondent

Total South Africa (Pty) Ltd.....Sixth Respondent

Engen Petroleum Limited.....Seventh Respondent

Judgment

Lopes J

- [1] This matter began as an urgent application brought on the 10th November 2015. The matter was opposed and adjourned on that day with an order made providing for the filing of affidavits. The matter was adjourned to the 3rd December 2015 when I heard the application.
- [2] The facts may be summarised as follows :
- (a) all five applicants are legal entities which carry on business as service stations selling petroleum products within close proximity to one another in the Newcastle area;
 - (b) the first respondent wished to conduct the business of a service station at 60 Murchison Street, Newcastle;
 - (c) the second and third respondents carry on the business of a service station at 22 Terminus Street, Newcastle;
 - (d) during 2006, Mr Kader who is the sole director of the first respondent , the sole member of the second respondent, and a member of the third respondent, applied for special consent to carry on the business of a service station and other activities on the premises referred to as 60 Murchison Street, Newcastle. That application was refused and an appeal was then made by Kader to the Town Planning Appeal Board in Pietermaritzburg.
 - (e) The Town Planning Appeal Board granted the appeal subject to certain conditions which may be summarised as follows :
 - (i) Mr Kader undertook to provide the Newcastle Municipality with a written undertaking in terms of which he agreed to cease operating the service station which he then operated at 22 Terminus Street; and
 - (ii) he abandoned all rights pursuant to which he operated that service station;
 - (iii) the date upon which the 22 Terminus Street service station was to cease operating would be on the last day of the month during which the service station at 60 Murchison Street began to conduct business.
 - (f) Having obtained the special consent, Mr Kader then applied for a site and retail licence for 60 Murchison Street in terms of the Petroleum Products Act, 1977.
 - (g) The reasons which Mr Kader gave for wishing to move the operation of his service station from 22 Terminus Street to 60 Murchison Street was that the Terminus Street service station was ‘insufficient and very crowded’.
 - (h) The site licence sought by Mr Kader for the operation of the 60 Murchison Street service station was refused on the 21st December

2011. An appeal was launched against the refusal of that licence on the 16th February 2012. In supplementary heads of appeal submitted to the Minister of Energy on the 24th April 2012, Mr Kader stated that he could not close the 22 Terminus Street service station due to the fact that the second respondent had renewed its agreement with Engen Petroleum Limited, the seventh respondent, in respect of the supply of fuel, and to close down that service station would constitute a breach of the second respondent's agreement with Engen.
- (i) The appeal was granted by the Minister of Energy and the matter referred back to the Controller of Petroleum Products for re-evaluation. The application for a retail licence for 60 Murchison Street was then approved on the 1st March
2013. It is important to note at this stage that the conditions imposed by the Town Planning Appeal Board at the request of Mr Kader, were still valid and enforceable against the property at 60 Murchison Street.
- (j) The construction of the new service station then commenced on the site at 60 Murchison Street. On the 9th September 2015 the applicants' attorneys referred to the conditions imposed by the Town Planning Appeals Board dated the 8th November 2006, and requested an undertaking by Kader that no more fuel would be sold from the site at 22 Terminus Street from the end of the month during which the service station at 60 Murchison Street began operations.
- (k) In a letter dated the 23rd September 2015 the first respondent and Kader's attorney confirmed in writing that 'Our client Rahim Abdul Kader and/or Kadbros Taxi, have ceased to operate the filling station on the site in question. Our client Mr Kader has also now ceased to enjoy any rights in the operation at such site.' The letter closes with the attorneys recording that their client has fully complied with the undertakings given to the Newcastle Municipality in 2006.
- (l) The applicants' attorneys sought further assurances from the attorney acting for the first respondent and Mr Kader, and he replied on the 5th October 2015 suggesting that any effort to limit the operation of a service station from the 22 Terminus Street site would be an attempt to stifle lawful competition, and was a violation of the Competition Act, 1998 and the Constitution. As I will set out later, Mr Kader had by then purported to make over the rights to operate the service station at 22 Terminus Street to his wife.
- (m) On the 16th October 2015 the applicants' attorneys notified the attorneys acting for the first respondent and Mr Kader that the service station at 22 Terminus Street was continuing to operate. They were called upon to cease that operation immediately. The applicants' attorneys also wrote to the Department of Energy for clarification and intervention, and that department responded on the 19th October 2015 stating that the 22 Terminus Street site was still being operated by Kadbros Taxi City CC and there had been no 'change of hands'. On the 19th October 2015 the attorney acting for the first respondent and Mr Kader addressed a strongly worded letter to the applicants' attorneys, alleging that the applicants were unlawfully interfering

with their client's rights to trade and requesting details of the identity of each of the legal entities represented by the

applicants' attorneys.

- (n) It is common cause that both the service station at 22 Terminus Street and the one at 60 Murchison Street have continued to operate by, inter alia, selling fuel in contravention of the provision imposed by the Town Planning Appeal Board. Eventually this application was delivered on an urgent basis.
- (o) It appeared in the course of the delivery of the affidavits in this application that the second and third respondents had in fact been de-registered on the 22nd June 2009 and the 12th November 2009 respectively. Notices had been published by Kader in terms of the relevant legislation for the reinstatement on the Companies Register of the second and third respondents. This has been somewhat overtaken by events, as I was informed at the hearing on the 3rd December 2015 that the second respondent was reinstated pursuant to an urgent application heard in the High Court of South Africa, Gauteng Division in Pretoria on the 1st December 2015. That order validated all the actions of the second respondent retrospectively.
- (p) The third respondent, however, remains deregistered and I was informed that an urgent application would be moved during the course of the next two weeks in Pretoria to have the third respondent similarly reinstated on the Companies Register.
- (q) In addition, it also emerged during the course of the delivery of the various affidavits that Engen had discovered that there was a problem with the retail licence certificate which was relied upon by Mr Kader in concluding the supply agreement with Engen. The problem was that the licence is in the name of 'Radbro Taxy City CC' but used the company registration number of the third respondent, 'Radbro Taxi City CC' which was deregistered on the 22nd June 2009, and remains deregistered. In this regard Engen points out that 'Radbro Taxy City (Pty) Ltd' did not exist at the time the agreement was concluded by Engen with Mr Kader, because that company was only registered in 2015.
- (r) Engen is accordingly of the view that Radbro Service Station (22 Terminus Street) conducted business in contravention of the Petroleum Products Act, 1977, and in concluding agreements with Engen in November and December of 2010, the contracting party was described as 'Kadbro Taxi City CC' bearing the registration number of 'Kadbro Taxi City Service Station CC'. As a result of these anomalies, Engen immediately terminated the delivery of fuel products to the 22 Terminus Street service station. In addition, Mr Dayal, who appeared for Engen in the application, notified the court that it was his client's intention to cancel the existing contracts between Engen and Kadbro Taxi City CC.
- [3] At the outset of the hearing on the 3rd December 2015 Mr Grundlingh, who appeared for the applicants together with Mr Bekker, notified me that on the 2nd December 2015 an employee of the first applicant had gone to the 22 Terminus Street premises and filled up

with R20 4 worth of petrol. This, he submitted, pointed to the fact that Mr Kader was unrepentant and was determined to carry on business despite the undertaking he had suggested at the Town Planning Appeal Board hearing, and subsequently confirmed to the Town Planning Appeal Board.

- [4] It was common cause that the issues raised in the answering affidavits of urgency, non-joinder and the issue of a certificate by the Municipality in respect of the 60 Murchison Street operation, to enable it to begin trading on the 15th September 2015, were no longer issues in the application.
- [5] Mr Grundlingh dealt with the suggestion in the papers that the proposal by Mr Kader that special conditions should be imposed by the Town Planning Appeal Board, and which were subsequently imposed by that Board, constituted a contract, presumably between the Town Planning Appeal Board and/or the Newcastle Municipality and Mr Kader. The result of this was that any legal proceedings dealing with those special conditions had to be viewed within the prism of the laws of contract.
- [6] Mr Grundlingh referred me to *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) at 531 (C – D) where Schreiner JA stated :

‘To sum up the position as it appears from the foregoing, there is authority and reason for holding that the steps by which a township is established and proceedings can be brought to recover endowment moneys, involved mutual consent between the Administrator and the applicant as to the township conditions, and that the Administrator may be regarded, not inappropriately, as making an offer to the applicant which the latter must accept if a township is to be brought into existence. But there is no authority binding on this Court to the effect that the mutual assent, though it may properly be called an agreement (cf. Williston, *Contracts Revised Ed.*, para. 2), is a contract for the purposes of the Prescription Act.’

- [7] Mr Grundlingh also referred me to *Transvaalse Raad vir die Ontwikkeling van Buitestedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 (3) SA 351 where the Court held held that where a local authority is responsible for the application of the provisions of a regional town planning scheme, and the local authority gives the owner of property the jurisdiction to use the land for particular purposes (digging and removing sand) then no contractual relationship is created between the parties, but in essence there is an extension of the Scheme insofar as the piece of land is concerned. Conditions imposed by the local authority on the owner doing anything in conflict with the provisions of the Scheme are set out in the Ordinance and the local authority is confined to those rights.
- [8] In the light of those authorities, Mr Grundlingh submitted that there can be no question of a contract having been concluded. Mr Grundlingh submitted that it was significant to look at the conduct of Mr Kader who was the alter ego of the first, second and third respondents. He submitted that Mr Kader must have known that the corporations he was involved in, were deregistered in 2009. On the 16th October 2015 he published a notice for the reinstatement of the third respondent. On the day on which he deposed to the first, second and third

respondents' answering affidavit, the 20th November 2015, a notice was published for the reinstatement of the second respondent.

- [9] Mr Grundlingh submitted that it was significant that Kadbrow Taxi City Service Station CC was formed shortly after the retail licence was granted in respect of 22 Terminus Street. This is the licence which I referred to above reflecting the licensee as 'Radbrow Taxi City CC'. The agreement which was concluded with Engen is concluded by Radbrow Taxi City CC, with the incorrect registration number. Mr Kader alleged in an affidavit deposed to by him in a urgent application in the Pretoria High Court for the reinstatement of that close corporation, that the errors were 'typographical errors'.
- [10] Thereafter Radbrow Taxi City (Pty) Ltd was formed in 2015 and on the 18th September 2015 Mr Kader wrote to one Goodness Mseko of Engen suggesting that Engen send him new retail dealer agreements in the name of 'Radbrow Taxi City' (and not Kadbrow Taxi City) and he points out that the new owner of Radbrow Taxi City is Mrs Moonawar Kader, who is Mr Kader's wife.
- [11] In the light of these facts Mr Grundlingh points to the letter of the 23rd September 2013 when the attorney acting for the first respondent and Mr Kader recorded that 'Our client Rahim Abdul Kader and/or Kadbrow Taxi have ceased to operate the filling station on the site in question'. This being a reference to the 22 Terminus Street site. Mr Grundlingh submitted that what Mr Kader is trying to do is suggest that he no longer has any rights or obligations in respect of the 22 Terminus Street premises, and, accordingly he is not in breach the special conditions imposed by the Town Planning Appeals Board. Mr Grundlingh submitted that given the conduct of Mr Kader in relation to the 22 Terminus Street site which was contrary to the special conditions imposed by the Town Planning Appeals Board, the applicants had no option but to approach this court for an urgent interim interdict. That interdict is to operate pending the resolution of the application made by the first, second and third respondents to the Newcastle Municipality for the removal of the special conditions.
- [12] Mr Combrink, who appeared for the first and second respondents, conceded that in terms of the Petroleum Products Act, 1977, both a site licence and a retail licence were required in order to operate a petroleum retail outlet. If either of the licences was missing, any such operation would be unlawful. He conceded that the second respondent, in the absence of the third respondent which has been deregistered and which was the holder of the site licence for the 22 Terminus Street outlet, could not legally sell petroleum from the 22 Terminus Street outlet. As a pre-requisite for that to happen the third respondent had to be re-instated retrospectively.
- [13] Mr Combrink submitted that 'need' was not a requirement for a Town Planning Scheme. A Town Planning Scheme relates to the 'usage' of the particular property and is consent for that site to operate in a particular way. Matters relating to use such as, in the case of a service station, that tanks must be a certain distance from the boundary, that no large trucks

may be placed on the forecourt, that no loud music may be played, etc are 'use' requirements because the conduct of the service station involved the public's use of the facility.

- [14] Mr Combrink submitted that a municipality may impose 'usage' conditions. However, the condition imposed in this matter had nothing whatsoever to do with the usage of the 60 Murchison Street site. What was imposed was a competitive based condition which was not in terms of the by-laws. This was a commercial consideration only, and was tantamount to requiring that in order to satisfy the objectives at the hearing, Mr Kader undertook not to trade at both premises but only to trade at one. Mr Combrink submitted that if the conditions imposed were not countenanced by the Town Planning Scheme, the prospect of their removal was a good one. The application has to be made to the Newcastle Municipality because the Town Planning Appeal Board no longer exists. He submitted that the probabilities are that the application to remove the special conditions, which had already been launched by the first, second and third respondents, had good prospects of succeeding. Mr Combrink submitted that the conditions which had been made applicable in Transvaalse Raad related to 'usage' and a particular piece of land. If the condition is not related to the land, as in this case, and has nothing to do with 60 Murchison Street per se, or the usage of the land, then it is not a condition which can be maintained.
- [15] Mr Combrink referred to the question of the enforcement of criminal sanctions in the event of a breach of the conditions. He submitted that he was bound to concede that the conditions which had been imposed by the Town Planning Appeals Board altered the nature of the scheme otherwise they would have had no legal efficacy, and no possibility of a prosecution existed in the event of a breach. He submitted that in those circumstances the conditions were nothing more than an extension of the Scheme.
- [16] Mr Combrink referred to the balance of convenience in this regard, and submitted that the stronger the prospects of success, the less the need to have the balance of convenience favour the applicant. He submitted that in this case the prospects of success for the applicants in having the conditions maintained by the Newcastle Municipality were weak, and accordingly there was a greater need for the balance of convenience to favour it.
- [17] In this regard Mr Combrink submitted that the applicants had shown no prejudice because there is a further Sasol site being constructed in Newcastle with the licence currently under review. The respondents had put up figures showing the quantity of fuel which they pumped, and they challenged the applicants to do likewise. He submitted that the applicants had chosen not to do so and in those circumstances had not proved they had suffered any loss or prejudice whatsoever. In addition, Mr Combrink pointed to the fact that the area was rapidly expanding, and the probabilities were that their pumping figures had increased and that they had suffered no loss whatsoever.
- [18] In reply Mr Grundlingh pointed out that at the Town Planning Appeals Board hearing in 2006, Mr Kader had been faced with the problem of objectors. In order to resolve that problem he had come up with the offer which he had made to the Board. The effect of that

order was he would essentially operate either from 22 Terminus Street or 60 Murchison Street, but not from both. Mr Grundlingh pointed out that what had in fact occurred was that Mr Kader had made a concession. The fact that he was now intending to apply to the Newcastle Municipality to set aside those conditions to which he agreed, indicates that he does not consider it a contract.

Mr Grundlingh also indicated that in 2012 Mr Kader indicated to the Regulator that he would abide by the concessions that he had made, but two months later said that he could not do so. From April of 2012 until December of 2014 nothing was done, and it was only in November of 2015 that an application was made for the removal of the special conditions. It was anticipated that the application to the Newcastle Municipality could take between four and five months to be finalised, and that during that period, prejudice will be suffered by the applicants. The balance of convenience did not favour the respondents because they delayed in bringing the application and whatever prejudice results to them is self-created.

[19] Mr Grundlingh also pointed out that the applicants were willing to make the pumping figures available to the court in order to enable it to assist in the decision. The applicants had not refused to reveal these figures to the court.

[20] The applicants seek to interdict and restrain the respondents from conducting the service stations at 22 Terminus Street and 60 Murchison Street at the same time. What they seek to implement is no more than the special conditions agreed to by Mr Kader in 2006. They seek this relief only as an interim order pending the institution and finalisation of the proceedings for the removal of the restrictive conditions. The requisites for an interim interdict are :

- (a) a prima facie right;
- (b) irreparable harm;
- (c) the balance of convenience; and
- (d) no other satisfactory remedy.

[21] In my view the applicants have clearly demonstrated a prima facie right being the restrictions on the operation of the property situated at 60 Murchison Street which were imposed by the Town Planning Appeal Board at the request of Mr Kader, who thereafter gave the necessary undertakings sought in terms of those restrictions.

[22] I am satisfied that the applicants will suffer irreparable harm in that if both 60 Murchison Street and 22 Terminus Street operate at the same time, the overall market share of the applicants will be reduced during the period up until the Newcastle Municipality makes a decision regarding the removal of the restrictive conditions.

- [23] I am also satisfied that the balance of convenience favours the applicants. I have some difficulty with the suggestion that Mr Kader should not be bound by the undertakings which were given to the Town Planning Appeal Board. In my view they should operate until they are set aside. In addition, it is factor in assessing the prejudice to Mr Kader and the respondents that Mr Dayal indicated in reply that Engen intended to persist in the non-supply of fuel to the 22 Terminus Street site, and intended to cancel the supply contracts.
- [24] I am also satisfied that there is no other satisfactory alternative remedy available to the applicants. The computation of their damages would be inexact and difficult to compute with any accuracy.
- [25] With regard to the question of costs, it is clear that Mr Kader has sought to employ various tactics to avoid having to comply with the undertakings which he gave to the Town Planning Appeals Board in 2006. In my view it would be just and equitable were he to be ordered to pay the costs.
- [26] In all the circumstances I make an order as follows :
- (a) Judgment is granted in terms of paragraphs 2, 3, 4 and 5 of the Notice of Motion dated the 27th October 2015.
- (b) The first and second respondents are directed to pay the costs occasioned by the applicants', jointly and severally, the one paying the other to be absolved, and such costs are to include the costs consequent upon the employment of two counsel where appropriate.

Date of hearing : 3rd December 2015

Date of judgment : 5th January 2016

For the Applicants : Mr Grundlingh and Mr Bekker (instructed by Geldenhuys Malatji Inc).

For the First and Second Respondents : Mr L Combrink (instructed by Sarlie & Ismail Inc).

For the Seventh Respondent : Mr S Dayal (instructed by Maharaj Attorneys).

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